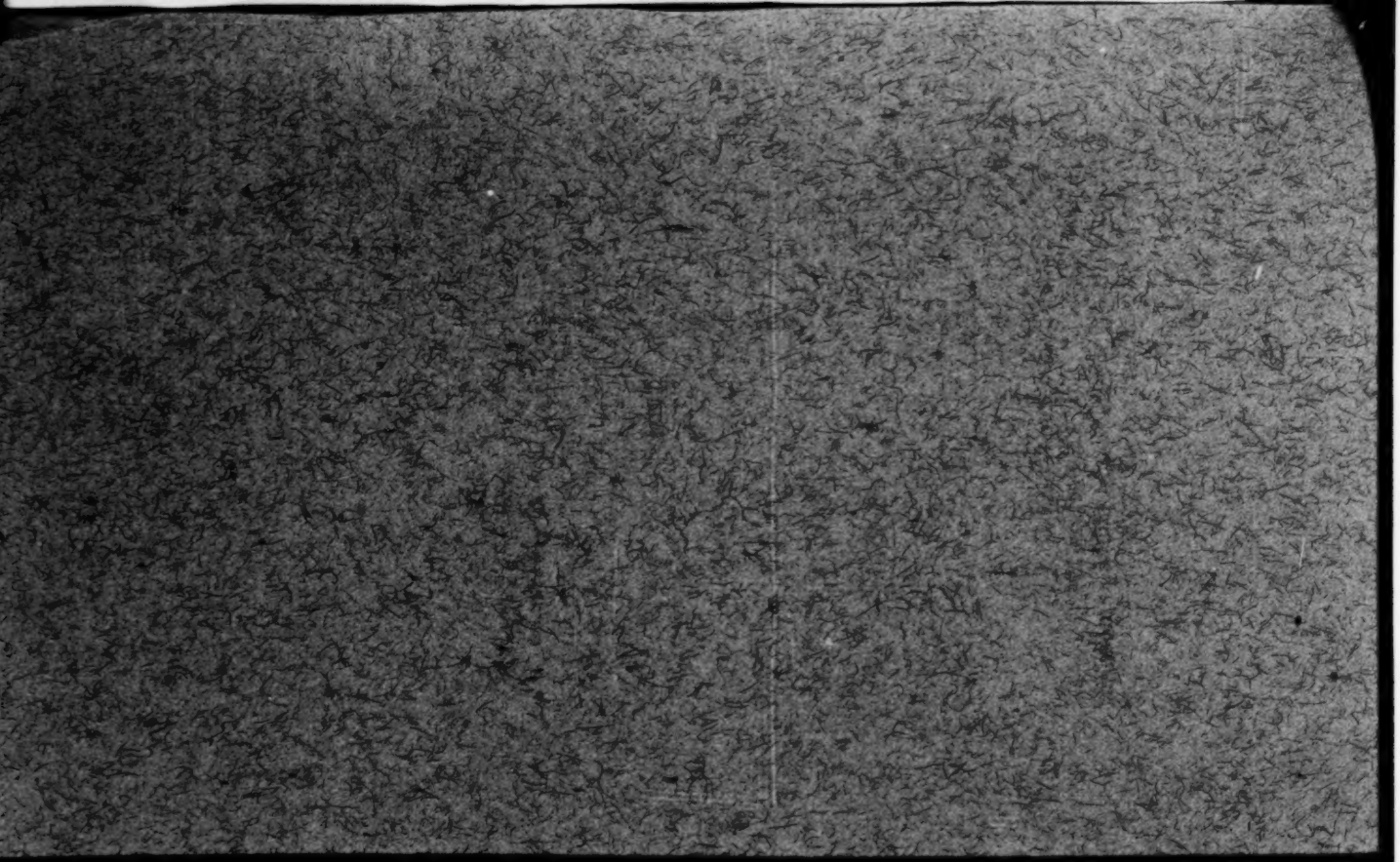

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1157

STANDARD SURETY AND CASUALTY COMPANY OF NEW YORK,

Petitioner,

vs.

THE PLANTSVILLE NATIONAL BANK AND THE FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The findings of fact (R. 32-36) and conclusions of law and opinion (R. 37-40) of the District Court are not reported. The opinion of the Circuit Court of Appeals (R. 134-140) is reported at 158 F. (2d) 422 (Adv.).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 4, 1946 (R. 141). A petition for rehear-

ing, filed on December 18, 1946 (R. 142-148), was denied on December 27, 1946 (R. 149). The petition for a writ of certiorari was filed March 25, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement

Petitioner (a corporation engaged in writing surety bonds) brought suit in the United States District Court for the District of Connecticut (R. 1-10)[1] against The Plantsville National Bank of Plantsville, Connecticut, (hereinafter called the "bank") and the Federal Deposit Insurance Corporation, as receiver of the bank, to recover damages of $60,286.34 alleged to have been suffered by the petitioner under two performance bonds executed by it on behalf of Van Dyke Construction Company (hereinafter called "Van Dyke"), and in favor of the Borough of Seaside Park, New Jersey, in the penalty of $115,644.13, and the Town of Claremont, New Hampshire, in the penalty of $85,500, in substantial reliance upon fraudulent representations of E. L. Sullivan, the cashier of the bank, that Van Dyke had a deposit balance of more than $53,000 and a credit line of $150,000 in the bank. Respondents answered (R. 21) generally denying the allegations in the complaint and moved for a bill of particulars (R. 12-13), which petitioner answered (R. 14-20), setting forth, *inter alia,* schedules of disbursements made by petitioner to complete the Seaside Park and Claremont projects. Pretrial interrogatories propounded by petitioner (R. 22-26) were answered by respondents (R. 27-29) prior to a pretrial conference which resulted in a pretrial memorandum or order (R. 30-32) settling,

[1] Pursuant to the provisions of U. S. C., Title 28, Section 41(16), as one involving the winding up of the affairs of a national bank (R. 2).

for the purposes of trial, certain facts which are not in dispute. The pretrial order did not define any issues of fact or of law to be proven or urged at the trial, but it was agreed that respondents could offer photostatic copies (rather than originals) of letters requesting transfers of moneys from the Plantsville bank's account to the Central Hanover Bank and Trust Co. for the account of Van Dyke, as well as Hanover's record of such transfers and cashier's checks signed by Sullivan transferring such moneys (R. 32).

The only evidence at the trial was introduced by petitioner, respondents resting and moving to dismiss and to strike the testimony of one witness, viz., B. W. Fisk (R. 130-131), when petitioner rested. Petitioner conceded (R. 89) that Sullivan, who was cashier of the bank and who represented to petitioner that Van Dyke had a $53,000 (odd) deposit balance and a $150,000 credit line in the bank, was secretly interested in Van Dyke and was the owner of 533 shares of Van Dyke's 600 outstanding shares (R. 120). Respondents conceded that Sullivan's representations concerning Van Dyke's financial standing with the bank caused petitioner to write the Seaside Park and Claremont bonds (R. 90).

The former assistant cashier of the bank testified that in June 1939, when Sullivan disappeared from the bank, Sullivan's secret correspondence with, and financial interest in, Van Dyke were discovered (R. 119-120).

At or about the time Sullivan absconded, Van Dyke defaulted in its construction work which prompted one Riley, a former officer and member of petitioner's underwriting committee (R. 92), who was petitioner's principal witness, to address (R. 113) a memorandum (R. 85-86) to petitioner's president reporting that a New York prosecutor, accompanied by a Connecticut policeman, served a subpoena

on petitioner for all of its records relating to Van Dyke; that the Seaside Park bond was "two-thirds reinsured" and that

> "When the bonds were written, we verified the bank balance with the Plantsville National Bank of Plantsville, Conn. We insisted that the money be withdrawn from that bank because of its size and this was done" (R. 85).

Riley further testified (R. 115) that to his knowledge some funds were transferred from the Plantsville bank to a New York bank; that petitioner engaged attorneys and an engineer to take charge of the investigation, legal work, auditing and settling claims and letting new contracts to complete the two projects (R. 94); that he (Riley) severed his connection as an employee of petitioner before the projects were completed (R. 94); that petitioner had executed other bonds at the instance of Van Dyke, including at least one construction contract on the "Hoboken" project (R. 111, 112) and that after petitioner had relet the Seaside Park contract to the Titan Construction Corporation (hereinafter called "Titan"), the latter also defaulted (R. 94). The Proctor Company was engaged to finish the Seaside Park project when Titan failed (R. 88).

The only witness offered by petitioner to prove damages or proximate cause thereof was one of petitioner's employees, B. W. Fisk, an accountant and custodian of petitioner's records relating to completion of the Seaside Park and Claremont projects (R. 123, 124), who testified as to total figures consisting of payments to contractors, labor, and material creditors, and to attorneys and an engineer. Fisk's testimony[2] consumes less than three pages of the printed transcript (R. 123-125). Thereupon

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[2] Including objections by respondents' attorney on the ground that the witness was not properly qualified and that the proper foundation had not been laid for his testimony, and some colloquies.

petitioner rested and respondents moved to dismiss on the ground that petitioner had failed to establish its case (R. 126). Petitioner then recalled Fisk (R. 128) who explained discrepancies between the amount claimed in the complaint and the total of items in the bill of particulars, as well as the attorney fees paid on both projects (R. 128-130). Petitioner again rested and respondents moved to strike all of Fisk's testimony as being no evidence, no groundwork having been laid, and incompetent (R. 130-131). This motion was denied (R. 131) and the case submitted on respondents motion to dismiss and for judgment on the merits—the court reserving its ruling thereon (R. 126).

Question Presented

Will this Court review the judgment of the Circuit Court of Appeals affirming the judgment of the District Court granting the motion of respondents (the insolvent bank and its receiver) to dismiss the suit because petitioner failed to prove that the damage (or any portion thereof) alleged to have been suffered by it was the result of the dishonest cashier's fraud which was imputed to the bank?

Argument

Neither the petition nor the brief in its support establishes a basis for the grant of a writ of certiorari in this case. The petitioner presents no special or important reasons justifying review on certiorari. The decision of the Circuit Court of Appeals is not shown to be in conflict with the decision of another Circuit Court of Appeals on the same matter, nor is there here involved an important question of Federal law which has not been settled by this Court or which has been decided in conflict with any decision of this Court. Quite the contrary, both the District Court and the Circuit Court of Appeals relied upon and applied the doctrine in *Gleason* v. *Seaboard Air Line Railway Co.*, 278 U. S. 349.

Petitioner's contention that the courts below erred and decided the case in derogation of and conflict with the principle of the *Gleason* case is, to say the least, startling, since the opinions plainly show that both courts invoked and applied the *Gleason* ruling to this case despite vigorous opposition by respondents. In other words, both the District Court and the Circuit Court of Appeals rejected respondent's contention that the bank was not responsible for the fraud of the cashier. Petitioner can hardly complain of a conclusion, in which both courts are in accord, which is favorable to it. Since, patently, there is no conflict in this case with that decision of this Court, petitioner's "outstanding reason" for seeking certiorari fails.

It is clear that the courts below, having imputed Sullivan's misrepresentations to the bank, rested their decisions against the petitioner on the ground that it had wholly failed to meet the burden of proving that its loss or damage was occasioned by or attributable to the fraud so imputed to the bank.

Petitioner complains of the ruling below and cites, as his "best answer" to the court's views (R. 147), section 546 of the Restatement of the Law of Torts. But, manifestly, both courts found that the petitioner's "justifiable reliance upon the misrepresentations," although "a substantial factor in determining [its] course of conduct," *did not "result in* [*its*] *loss"* (R. 39, 138). Here lies the distinction between this case and the judgment in the *Gleason* case. Indeed, in reply to petitioner's contention we can do no better than to rely upon the very decision in the *Gleason* case, where this Court reinstated a jury verdict because the evidence was sufficient to establish that the loss *was* the direct result of the fraud, saying that there was evidence "plainly indicating that petitioner would not have paid the draft without [the false] assurance"

(*Gleason* v. *Seaboard Air Line Railway Co., supra,* at p. 352). No similar causation appears in the case at bar and the Circuit Court's fact-finding to that effect affords no sound basis for review by this Court.

Petitioner failed to offer, with no explanation for the omission, any testimony of qualified witnesses, such as the attorneys or the engineer who was engaged to complete the project, but merely relied upon the most general type of summation by its last witness who was no more than the custodian of the records and who was in no way shown to be qualified. See *Roosevelt* v. *Missouri State Life Insurance Co.* (C. C. A. 8), 78 F. (2d) 752, where the court said (p. 762):

> "The man who prepared the appraisal was not placed upon the stand and no foundation whatever was laid for the admission of this hearsay testimony; in fact, it scarcely reaches the dignity of hearsay because there was no proof that it was prepared by the person purporting to have prepared it. It is therefore wholly without any probative force."

By its own testimony, petitioner disclosed several salient facts, in addition to those dealt with by both courts below, tending to disprove any causal connection between the loss and the fraud imputed to the bank, namely:

(1) The fictitious deposit account of about $53,000 was approximately equal to the face value of the 533 shares of Van Dyke preferred stock owned by Sullivan who apparently transferred substantial sums surreptitiously from the Plantsville bank to a New York bank for the account of Van Dyke (R. 85, 115) which funds were presumably used by Van Dyke to complete at least the Hoboken project and to undertake others;

(2) Van Dyke apparently was involved in some irregularities, if not criminal violations, under either the New

York or Connecticut laws (R. 85, 96) which may have been the cause of Van Dyke's failure to complete the projects;

(3) Petitioner refused to write certain bonds applied for by Van Dyke in the spring of 1939 (R. 116), but neglected to explain its failure then or thereafter to protect itself from loss until Van Dyke defaulted in June 1939;

(4) Petitioner sublet the Seaside Park contract to Titan, which, for unexplained reasons, also defaulted under a new construction bond written by National Surety Corporation for only $70,000 (R. 94) although there was a balance of more than $110,000 due under Van Dyke's contract with Seaside Park (R. 128); and

(5) Petitioner's bond in the Seaside Park project, the largest one, was "two-thirds reinsured" (R. 85) but petitioner failed either to aver or prove the extent to which it was reimbursed by its co-sureties or whether the damages were being claimed on behalf of itself and co-sureties.

If this action had been brought at common law for deceit against the bank as a going concern, it seems axiomatic that the proof offered by petitioner was wholly inadequate to establish the damage and causal elements of its case. *Roosevelt* v. *Missouri State Life Ins. Co., supra; Twachtman* v. *Connelly* (C. C. A. 6), 106 F. (2d) 501, 506, citing *B. F. Avery & Sons* v. *J. I. Case Plow Works* (C. C. A. 7), 174 F. 147, and *Wright* v. *Brush* (C. C. A. 10), 115 F. (2d) 265, 267. *A fortiori,* the decisions of the courts below are correct since petitioner is here seeking to establish a claim for an alleged undisclosed liability against the receiver of an insolvent national bank, rather than against the bank itself.

Petitioner's rights, if any, and the manner of their enforcement are governed by a Federal statute (R. S. 5236; U. S. C. Title 12, Sec. 194) and although the extent and cir-

cumstances of their enforcement are left to judicial determination, they are nevertheless derived from the Federal statute and the Federal policy which implements it. *Dinan* v. *First National Bank of Detroit* (C. C. A. 6), 117 F. (2d) 459, cert. dismissed, 315 U. S. 824; cf. *Federal Deposit Insurance Corporation* v. *Vest* (C. C. A. 6), 122 F. (2d) 765, cert. den., 314 U. S. 696. The depositors and other creditors of the bank, rather than the bank itself, are petitioner's real adversaries. See *McCandless* v. *Furlaud*, 293 U. S. 67; *Dietrick* v. *Greaney*, 309 U. S. 190; *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245. Petitioner, therefore, had an even greater burden than at common law and the proof adduced by it was too feeble and damaging to stretch the bank's gratuitous misrepresentation, as is so aptly pointed out in the trial court's opinion (R. 40), "into a sweeping agreement to relieve the plaintiff of the entire risk which it assumed for a consideration"—and, the court might well have added, at the expense of depositors and creditors of the bank who have already suffered by reason of Sullivan's peculations for Van Dyke's benefit. That this is the crux of the judgments below is evident from the concluding statement of the Circuit Court of Appeals in which, in complete harmony with the conclusion of the District Court, the court stated that it agreed with the trial judge "that the attribution of the plaintiff's losses to the absence of the deposit in the defendant-bank rests upon too slender a foundation to justify the imposition of any liability."

Conclusion

The substantive question of the liability of a national bank for the fraud of its cashier was decided in petitioner's favor and in accord with the principles settled by this Court; the judgments below, dismissing the case for failure

of proof, are correct and present no question of public importance. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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